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No. 80-915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA

v.

CRIDEN, HOWARD L., JANNOTTI, HARRY P., JOHANSON, LOUIS C., SCHWARTZ, GEORGE X. Jan Schaffer, a Witness in the Above-Referenced Proceeding,

Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS HOWARD L. CRIDEN, LOUIS C. JOHANSON AND GEORGE X. SCHWARTZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

Notwithstanding the impassioned argument presented by Petitioner in her Petition to this Court, the simple fact is that no question sufficiently significant to warrant consideration by this Court is presented in this case. Indeed, despite the potential for disparate approaches to the issue of the proper scope of a journalist's testimonial privilege, the Circuit courts have adopted a consistent stance in this area and have repeatedly and properly applied the standards established by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), on a case-by-case basis in light of the particular facts involved in each such case. No dispute exists among those Courts of

Appeals that have addressed the qualified privilege question and no necessity exists for this Court to consider the issues raised by this Petition.[1]

Thus, petitioner's assertion that a "lack of uniformity" exists in this area is not borne out by the facts since every appellate court that has dealt with this question has, with only semantic differences, established and applied a three-part test: Is the information sought of a crucial nature and does it go to the heart of the claim?; Are other sources of information available and, if so, have those sources been exhausted?; and Is there a compelling need for the information sought? And it is this precise test, the very test which has been adopted by the seven circuits that have dealt with the question, which was employed by the Third Circuit in this case, and it is this same set of standards for which Petitioner seeks this Court's imprimatur. (See Petition, at 8.) Given the established state of the law in this area, it is respectfully suggested that such approval is unnecessary and that, even if this Petition were granted and Petitioner's suggestions sustained, the Third Circuit's holding in this case would be unaffected.

Furthermore, none of the contentions set forth by Petitioner in support of her position have any merit once they are applied to the specific facts of this case and their internal inconsistency is recognized:

A. The mere fact that the proceeding at issue involves a criminal defendant's motion to dismiss the indictment for prosecutorial misconduct and that such a motion is infrequently successful is of no significance whatsoever in assessing the propriety of compelling a re-

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1. In each of the decisions which have addressed this issue, cited in Petition, at 6n.5, the Courts of Appeals have employed the very same standards adopted by the Third Circuit in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), and used by the Third Circuit in its determination to sustain the contempt citation in the instant case.

porter to testify. No doubt exists but that defendants are entitled to raise and litigate this issue, and it can further be asserted with high assurance that, despite any disfavor with which courts may view dismissal of an indictment on such grounds, sufficient circumstances can and have been presented to justify the imposition of sanctions for such governmental misconduct, including dismissal of indictments. *E.g., United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978); *see, United States v. Serubo,* 604 F.2d 807 (3d Cir. 1979); *See also United States v. Hampton,* 425 U.S. 484, 494 (1976) (Powell J., concurring in judgment); *United States v. Russell,* 459 F.2d 671 (9th Cir. 1972), *rev'd* 411 U.S. 423 (1973). As the Third Circuit stated in its Opinion below, it would be improper for any court to reject defendants' contentions absent a complete factual record, and that, given the trial court's conclusion that defendants' position was not frivolous, an opportunity must be afforded to them to develop just such a record. (A.18-19).

Moreover, it must be emphasized that the factual predicate of the entire prosecution — the Justice Department's ABSCAM investigation — and the well-publicized circumstances surrounding both the investigation itself and the manner in which it was initially brought to the attention of the public, plainly raises substantial issues involving the propriety of governmental conduct and its effect upon the issuance of the indictments and any subsequent trial proceedings. To cavalierly assert, as does petitioner, that the defense motions should never have been considered or should have been delayed until after trial is most presumptuous.[2] And, in light of the district court's post-trial decision in this case which expressly found sufficient governmental miscon-

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2. It is apparent that defendants had the right to litigate and obtain a decision as to all preliminary motions so that, in the event they were successful, they could have avoided the financial demands and emotional rigors of trial.

duct to warrant the entry of judgments of acquittal as to both defendants Schwartz and Jannotti, such an assertion is plainly incredible.[3]

B. Petitioner was not compelled to participate in some unholy process of elimination and the facts of this proceeding should not be obscured by such generalized and misleading averments. In this case, the source, United States Attorney Vaira, revealed his identity and testified to the fact that he had called and spoken with Petitioner and to the content of these conversations. Up to the point in time when she was held in contempt of court, the only inquiry made of Petitioner was whether she had spoken to Mr. Vaira. It was this question and this question alone which Petitioner refused to answer. (A.27)[4] On these facts, the only facts before the Court in

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3. On November 26, 1980, the district court directed the entry of judgments of acquittal as to defendants Schwartz and Jannotti on the grounds, *inter alia*, that the evidence before it established entrapment as a matter of law and that governmental overreaching in this case amounted to a violation of defendants' right to due process of law.

It should also be emphasized that, despite the entry of judgments of acquittal in this case, the testimony of petitioner is yet not moot since the government has appealed the district court's decision and, in the event that decision is reversed on appeal and the case remanded to the district court, defendants will, as the Court of Appeals noted, have the right to proceed with petitioner's testimony and to resubmit their motions to dismiss the indictments. (A.12)

4. It should be emphasized that, as the Third Circuit recognized, "this case does not require disclosure of sources." (A.27). Nevertheless, the Court of Appeals applied the "more stringent test" fashioned for disclosure of sources in *Riley v. City of Chester*, *supra*, and found:

> " . . . the defendants have established a record sufficient to demonstrate their entitlement to the limited information sought. We need not develop a precise test for the peculiar circumstances presented here, although we will venture the view that *the defendants probably should be required to prove less to obtain the reporter's version of a conversation already volun-*

this instance, one is hard-pressed to conclude that compelling Petitioner to respond would or could have any direct or even peripheral impact upon a newsman's ability to gather information, report the news or even to assure potential sources that their identities will be held in confidence. To suggest further that this limited inquiry might somehow undermine the public's perception of a journalist's "absolute trustworthiness" — another questionable assertion given the absence of any absolute newsman's privilege, *see, e.g., Herbert v. Lando,* 441 U.S. 153 (1979); *Branzburg v. Hayes, supra,* is likewise without merit once it is recalled that, here, the source voluntarily disclosed his identity.

Finally, Petitioner's entire argument in support of her Petition is grounded upon her speculations as to the scope of inquiry which might have been permitted by the trial court if defense counsel's questioning had continued. However, any validity which might otherwise be ascribed to these assertions cannot now be decided. The trial court stated that it would rule only on a question-by-question basis in connection with petitioner's testimony (A.36), and, as a result, the extent of petitioner's testimony which would have been required by the district court is presently unknown.

C. In attacking the appellate court's conclusion that the Petitioner's testimony satisfied the requirement

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tarily disclosed by the self-confessed source than to obtain the identity of the source itself. (A.27-28) (emphasis added)

* * *

"Satisfaction of the Riley test means that countervailing constitutional rights override the reporter's privilege to protect her sources. *In view of the district court's announced limitations, and our assumption that future disputes will be resolved under the framework constructed in Riley, we do not reach the source disclosure issue here.* We hold only that the district court did not err in ordering Schaffer to answer a question unrelated to source disclosure, and that her refusal to do so was grounds for civil contempt." (A.30) (emphasis added)

that such testimony be "crucial," under the standard established by *Riley v. City of Chester, supra,* Petitioner again attempts to divorce its position from the facts of this case. *Arguendo,* corroborative or impeaching testimony may not be sufficiently "crucial" in many cases to justify compelling a journalist to testify. However, as the Court of Appeals found in this case, where the issues raised in the trial court proceeding involve allegations of serious and flagrant prosecutorial misconduct (A.34-35), the motivation of government officials in "leaking" information about ABSCAM to the news media is central to that proceeding, and any information which might shed light upon the conduct of those officials or, perhaps, dispute their sworn testimony as to these events, must be available if defendants are to receive a fair hearing. (A.29).

D. As to the Petitioner's contention regarding the purported availability of other sources for the information sought from her, it is unrealistic to suggest that any other reliable source of information exists to a two-party conversation other than the two parties themselves. Having reviewed United States Attorney Vaira's recollection of the conversation with Petitioner, and having established their right to inquire, at least initially, into Petitioner's understanding of that same conversation, the sole source of such an inquiry must be Petitioner herself. Furthermore, as the Court of Appeals noted, defendants did attempt to obtain this or related information by pursuing other avenues, some of which were barred to them by the Court's refusal to disclose internal governmental investigative materials such as "The Blumenthal Report." (A.28-A.29). However, any suggestion that disclosure of such sources or materials would have served to satisfy defendant's need for Petitioner's testimony is sheer speculation and is, far more likely, wholly unfounded since the trial court had received "The Blumenthal Report" *in camera,* was aware of its

contents, and could have alleviated the need for Petitioner's testimony by disclosing any relevant portions of that Report. Obviously, the district court's action in this instance plainly indicates that no information relative to the area of Petitioner's testimony was included in that Report.

E. Petitioner misstates the rationale expressed by the Court of Appeals in holding that the instant issue, since it implicates the court's authority to hold and conduct public hearings, is not moot.[5] Neither the trial nor appellate court states or suggests that such a rationale, standing alone, will be sufficient to sustain a civil contempt order regardless of the correctness of that order, as Petitioner contends, nor does the Court of Appeals employ this principle in order to avoid an inquiry into the merits of the contempt Order. (Petition, at 11.) What the Third Circuit held was that the validity of the contempt Order remains ripe for decision regardless of the status of the underlying proceeding, and not that the validity of that Order would escape examination. The result of such a holding is to afford to Petitioner just that opportunity for appellate review which she vigorously demands and assures that, by reason of unrelated events, a trial court's contempt Order is permitted to stand without any right of review.[6]

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5. Here, the Court of Appeals found, on other grounds, that the underlying proceeding was not moot. Thus, this alternative holding may be viewed as *dicta*.

6. The desirability of affording appellate review to such orders, given their significance and the fact that they are capable of repetition has long been recognized and approved by the journalistic establishment. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *United States v. Steelhammer*, 539 F.2d 373, 376, *rev'd on other grounds on rehearing* 561 F.2d 539 (4th Cir. 1977) (citing cases).

CONCLUSION

The Third Circuit, as well as the trial court below, carefully and correctly determined, under the appropriate standards and in light of the relevant constitutional considerations, that Petitioner should be required to testify as directed by the court. In effect, and to quote Petitioner's own language, these courts found, upon analysis of the facts of this case, that Petitioner's testimony was "strictly and inescapably necessary to accommodate another constitutionally mandated interest," (Petition, at 8) that being the right of the criminal defendants herein to that testimony. (*See* A.30) Given this express ruling, the absence of any conflict or disagreement among the courts of appeals as to the nature of a journalist's qualified privilege, and for all of the other reasons set forth herein, the instant Petition for Certiorari must be denied.

Respectfully submitted,

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